Vijendran Ponniah v MBF Country Homes & Resorts Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUMMONS NO S2(S1)-23-16 OF 1996

KAMALANATHAN RATNAM J

12 NOVEMBER 2001

Bankruptcy *— Notice — Judgment in default of appearance — Judgment obtained through wilful falsehood and concealment of material facts — Whether final judgment for issue of notice — Bankruptcy Rules 1969 r 95*

Civil Procedure *— Abuse of process — Bankruptcy proceedings for sum less than that owed to judgment debtor — Whether want of reasonable and probable cause for institution of bankruptcy proceedings — Award of damages*

Tort *— Malicious prosecution — Bankruptcy petition — Want of reasonable and probable cause — Judgment in default of appearance against plaintiff obtained through wilful falsehood and concealment of material facts, whether valid judgment — Whether default judgment was final judgment for commencement of bankruptcy — Award of damages*

The plaintiff was an advocate and solicitor. On 4 August 1986, the plaintiff sent the bills to the first defendant and its holding company for the facilities agreement and loan agreement prepared. Subsequently, on 29 March 1988, the first defendant sent a notice of demand to the plaintiff who was a holder of a credit card from the first defendant, claiming the sum due on the credit card. By a letter dated 6 April 1988, the plaintiff denied owing the sum to the defendant. Instead, the plaintiff demanded payment on his bills which far exceeded the sum claimed by the first defendant. A summons was issued by the first defendant on 23 April 1988 but was never served on the plaintiff. The first defendant nevertheless proceeded to obtain judgment in default of appearance against the plaintiff on 28 June 1988. Four years later, on 1 December 1992, the first defendant instructed the second defendant to commence bankruptcy proceedings against the plaintiff. Upon the publication of the creditor's petition against the plaintiff in the newspaper, the plaintiff applied to set aside the service of summons. On the preliminary issue that the summons was never served on the plaintiff, the learned magistrate set aside the service of the summons on 22 August 1995 and struck out the creditor's petition. The plaintiff filed this action to claim for damages for civil malicious prosecution arising out of the bankruptcy proceedings and for abuse of court process.

Held, awarding the plaintiff RM200,000 as general damages, RM100,000 as aggravated damages for malicious prosecution and RM100,000 for abuse of process against both defendants:

(1) As a general rule, it is not an actionable wrong to institute civil proceedings without reasonable and probable cause, even though malice is provable. Bankruptcy proceedings instituted maliciously and without reasonable and probable cause however, is an exception to this general rule. The principles applicable to civil malicious prosecution of bankruptcy proceedings are the same as in actions for malicious prosecution for the institution of criminal proceeding (see p 541F–H).

(2) Where it is plain that there is a want of a reasonable or probable cause or excuse, it is reasonable to conclude that the defendant could not honestly have believed in the charge he made and this is evidence of malice. Evidence of malice could also be construed from utter recklessness or failure to make proper and adequate enquiries, or not making any effort to test one's information or grounds of suspicion, for veracity (see p 547B–C).

(3) Orders obtained through willful falsehood and by concealment of material facts could not amount to valid judgments. As there was no valid judgment, the court rejected the argument that the default judgment, until set aside, was a good and enforceable judgment and that the first defendant was entitled to rely on the default judgment as a basis to proceed with the bankruptcy proceeding (see p 546C–D).

(4) Under r 95 of the Bankruptcy Rules 1969, a bankruptcy notice is to issue only on a final judgment or order where executions had not been stayed. A judgment is not final if it is not given on its merits as it is liable to be set aside on application and does not finally dispose of the rights of the parties. As a default judgment does not constitute a final judgment, bankruptcy proceedings ought not to have been commenced (see p 545E–F, H); *Re Udos ak Riging, ex p Seabanc Kredit Sdn Bhd* [1994] 3 MLJ 383 followed.

(5) In a claim for damages for abuse of process, so long as the plaintiff could show and the court is satisfied that there was want of reasonable and probable cause for the institution of the bankruptcy proceedings, the plaintiff must succeed in his action for abuse of process. However, if the court is not satisfied that there was want of reasonable and probable cause, the plaintiff would have to prove that he had suffered some damage or injury in consequence of the process which was initiated for a purpose other than to obtain a genuine redress (see pp 548D–549A). In this case, the defendants commenced bankruptcy proceedings for a sum not exceeding half of the amount that was owed by the first defendant to the plaintiff. No commercial purpose was served by seeking the plaintiff's bankruptcy and the distribution of his assets. Thus the bankruptcy proceedings were an abuse of process commenced and maintained to effect an object not within the scope of the process and causing the plaintiff damage (see p 549D–E).

[Bahasa Malaysia summary

Plaintif adalah seorang peguambela dan peguamcara. Pada 4 Ogos 1986, plaintif telah menghantar bil-bil kepada defendan pertama dan syarikat induknya untuk penyediaan perjanjian kemudahan dan perjanjian pinjaman. Berikutan itu, pada 29 Mac 1988, defendan pertama telah menghantar satu notis tuntutan kepada plaintif yang merupakan pemegang kad kredit defendan pertama, menuntut jumlah terhutang kad kredit tersebut. Melalui sepucuk surat bertarikh 6 April 1988, plaintif telah menafikan hutangnya dengan defendan. Sebaliknya, plaintif telah menuntut pembayaran bil-bil beliau yang melebihi jumlah yang dituntut oleh defendan pertama. Satu saman telah dikeluarkan oleh defendan pertama pada 23 April 1988 tetapi tidak disampaikan ke atas plaintif. Namun begitu defendan pertama meneruskan untuk mendapatkan penghakiman ingkar kehadiran terhadap plaintif pada 28 Jun 1988. Empat tahun kemudian, pada 1 Disember 1992, defendan pertama telah mengarahkan defendan kedua untuk memulakan prosiding kebankrapan ke atas plaintif. Dengan tersiarnya petisyen pemiutang ke atas plaintif dalam akhbar, plaintif telah memohon untuk diketepikan penyampaian saman tersebut. Berdasarkan persoalan awal bahawa saman tersebut tidak pernah disampaikan ke atas plaintif, majistret yang arif telah mengetepikan penyampaian saman tersebut pada 22 April 1995 dan telah membatalkan petisyen pemiutang. Plaintif telah memfailkan tindakan ini untuk menuntut ganti rugi kerana pendakwaan berniat jahat yang timbul daripada prosiding kebankrapan dan penyalahgunaan proses mahkamah.

Diputuskan, mengawardkan plaintif sejumlah RM200,000 sebagai gantirugi am, RM100,000 sebagai gantirugi teruk untuk pendakwaan berniat jahat dan RM100,000 untuk penyalahgunaan proses terhadap kedua-dua defendan:

(1) Sebagai peraturan am, bukan satu perbuatan salah yang boleh didakwa untuk memulakan prosiding sivil tanpa sebab yang munasabah dan mungkin, walaupun niat jahat boleh dibuktikan. Prosiding kebankrapan yang dimulakan dengan niat jahat dan tanpa sebab yang munasabah dan mungkin bagaimanapun, adalah satu pengecualian kepada peraturan am ini. Prinsip-prinsip yang diterapkan dalam pendakwaan sivil niat jahat bagi prosiding kebankrapan adalah sama dengan tindakan untuk pendakwaan niat jahat dalam memulakan prosiding jenayah (lihat ms 541F–H).

(2) Di mana adalah jelas bahawa tidak terdapat sebab atau alasan yang munasabah atau mungkin, adalah munasabah untuk memutuskan bahawa defendan tidak mungkin boleh dengan jujur mempercayai apa yang beliau pertuduhkan dan ini adalah keterangan niat jahat. Keterangan niat jahat boleh juga ditafsirkan daripada sikap melulu atau kegagalan untuk membuat siasatan

yang betul dan mencukupi, atau tidak membuat apa-apa usaha untuk mengkaji maklumat seseorang atau alasan-alasan syak wasangka, untuk menentukan ketepatan kenyataannya (lihat ms 547B–C). A

(3) Perintah-perintah yang diperolehi melalui kepalsuan yang disengajakan dan melalui penyembunyian fakta-fakta yang material tidak membentuk penghakiman-penghakiman yang sah. Memandangkan tiada penghakiman yang sah, mahkamah menolak hujah bahawa penghakiman ingkar, sehingga diketepikan, adalah satu penghakiman yang baik dan boleh dikuatkuasakan dan bahawa defendan pertama berhak untuk bergantung kepada penghakiman ingkar sebagai asas untuk meneruskan prosiding kebankrapan (lihat ms 546C–D). B C

(4) Di bawah k 95 Kaedah-Kaedah Kebankrapan 1969, satu notis kebankrapan hanya boleh dikeluarkan atas satu penghakiman muktamad atau perintah di mana pelaksanaan-pelaksanaan tidak digantungkan. Suatu penghakiman adalah tidak muktamad jika ia tidak diberikan atas meritnya kerana ia boleh diketepikan atas permohonan dan tidak melupuskan sepenuhnya hak-hak pihak-pihak. Memandangkan penghakiman ingkar tidak membentuk satu penghakiman muktamad, prosiding kebankrapan tidak sepatutnya dimulakan (lihat ms 545E–F, H); *Re Udos ak Riging, ex p Seabanc Kredit Sdn Bhd* [1994] 3 MLJ 383 diikut. D E

(5) Dalam satu tuntutan ganti rugi untuk penyalahgunaan proses, jika plaintif dapat menunjukkan dan mahkamah berpuas hati bahawa perlunya satu sebab yang munasabah dan mungkin untuk memulakan prosiding kebankrapan, plaintif mesti berjaya dalam tindakan beliau dalam penyalahgunaan proses. Namun begitu, jika mahkamah tidak berpuas hati tentang ketiadaan sebab yang munasabah dan mungkin, plaintif perlu membuktikan bahawa beliau mengalami kerugian atau kecederaan akibat daripada proses tersebut yang dimulakan bagi tujuan selain daripada mendapatkan satu tebus rugi yang sah (lihat ms 548D–549A). Dalam kes ini, defendan-defendan telah memulakan prosiding kebankrapan untuk jumlah tidak melebihi setengah daripada jumlah yang terhutang oleh defendan pertama kepada plaintif. Tiada tujuan komersial tercapai dengan memohon kebankrapan plaintif dan pengagihan aset-aset beliau. Oleh itu, prosiding kebankrapan tersebut adalah satu penyalahgunaan proses yang telah dimulakan dan dikekalkan untuk memperoleh satu objektif yang bukan dalam skop proses tersebut dan telah menyebabkan plaintif mengalami kerugian (lihat ms 549D–E).] F G H I

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Civil Appeals No W–02–5 of 2002 and W–02–7 of 2001.]

A **Notes**

For cases on notice of bankruptcy, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1699–1816.

For cases on abuse of process, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 9–16.

B For a case on malicious prosecution concerning issue of bankruptcy petition, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) para 466.

Cases referred to

Adzmi bin Ali & Anor v Mohamed Isa bin Kasad [1987] 2 MLJ 199 (refd)

C *Aris bin Massod, Re; ex p UOL Factoring Sdn Bhd* [1998] 3 AMR 3155 (refd)

Bahori Lal & Anor v Sri Ram & Anor AIR 1946 All 139 (refd)

Chee Pok Choy & Four Ors v Scotts Leasing Sdn Bhd [2001] 4 MLJ 346 (refd)

D *Fitzjohn v MacKinder* 142 ER 199 (refd)

Johnson v Emerson & Sparrow (1871) 25 LT 337 (refd)

Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425 (refd)

Mohamed Amin v Jogendra Kumar Bannerjee & Ors AIR 1947 SC 108 (refd)

E *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100 (refd)

Premji Damodar v LV Govindji & Co AIR 1947 Sind 169 (refd)

Rohani @ Hamidah bte Nor v Sincere Leasing Sdn Bhd [1993] 1 AMR 225 (refd)

Shearer v Shields [1914] AC 808 (refd)

F *SMT SR Venkataraman v Union of India & Anor* AIR 1979 SC 49 (refd)

Udos ak Riging, Re; ex p Seabanc Kredit Sdn Bhd [1994] 3 MLJ 383 (folld)

Vijendran a/l Ponniah v Bank of Commerce [1998] 7 MLJ 418 (refd)

Williams v Spautz (1992) 174 CLR 509 (refd)

G **Legislation referred to**

Bankruptcy Act 1967

Bankruptcy Rules 1969 rr 95, 98

Legal Profession (Practice and Etiquette) Rules 1978 r 56

H *Joginder Singh* (*Murali Achan* with him) (*Vijendran & Co*) for the plaintiff.

Teh Beng Boon (*Heng & Mogan*) for the first defendant.

Trevor George De Silva (*Shook Lin & Bok*) for the second defendant.

Kamalanathan Ratnam J: The plaintiff is an advocate and solicitor and was at all material times the sole proprietor of his legal firm. The plaintiff's I firm prepared a facilities agreement for the first defendant for which a bill dated 4 August 1986 for the sum of RM15,000 was delivered to the first defendant. The plaintiff's firm also prepared a loan agreement for the first

defendant's holding company, MBf Holdings, for which a bill for RM31,250 was delivered to MBf Holdings. The two bills were not denied and/or disputed; neither did the first defendant or MBf Holdings pay the plaintiff on his said bills.

The plaintiff was a holder of a credit card from the first defendant, and as at 29 March 1988, there was a sum of RM7,519.44 due on the credit card. To the first defendant's previous solicitors' a notice of demand dated 29 March 1988 claiming the sum of RM7,519.44. The plaintiff, by his letter dated 6 April 1988, referred to his said unpaid bills and denied owing the first defendant the sum of RM7,519.44. The plaintiff further demanded payment on his bills which far exceeded the sum of RM7,519.44. The first defendant again did not dispute the plaintiff's claim or reply to the plaintiff's letter. The plaintiff, at the request of the first defendant's previous solicitors, again forwarded the bill with a letter dated 26 May 1988. There was no reply to this letter too. The first defendant, however, without serving the Kuala Lumpur Magistrate's Court Summons No 82–4065–88 ('the summons') on the plaintiff, proceeded to obtain judgment in default of appearance for the sum of RM7,519.44. Although the fact that the plaintiff was represented by solicitors was known to the first defendant's previous solicitors, no notice was given to the plaintiff under r 56 of the Legal Profession (Practice and Etiquette) Rules 1978. The summons was issued on 23 April 1988 and judgment in default of appearance (the default judgment) was obtained on 28 June 1988.

Having obtained the default judgment, the first defendant withheld execution proceedings for about four and a half years until it commenced bankruptcy proceedings against the plaintiff on 1 December 1992. No explanation was offered for withholding execution proceedings. The second defendant, the solicitors for the first defendant, received instructions from the first defendant along with a copy of the judgment, all other relevant documents, demand letters and cause papers, to institute bankruptcy proceedings against the plaintiff. The defendants continued with bankruptcy proceedings up to the point of publishing the issuance of a creditor's petition, in *The Star* newspaper.

On reading the advertisement of the creditor's petition in the local newspaper, the plaintiff applied to set aside the service of the summons. On a preliminary issue that the summons was never served on the plaintiff, the learned magistrate set aside the service of the summons on 22 August 1995. Consequently, the judgment in default was also set aside. The first defendant did not appeal against the decision of the learned magistrate. Neither did the first defendant commence a fresh action against the plaintiff. It must be noted that the creditor's petition was also posted on the notice board of the High Court at Kuala Lumpur. The plaintiff successfully set aside the service of the bankruptcy notice and had the creditor's petition struck out on 16 November 1995.

THE PLAINTIFF'S CLAIM

The plaintiff's claim is for damages for civil malicious prosecution arising out of the bankruptcy proceedings, and for abuse of process.

Civil malicious prosecution

With regard to the claim for civil malicious prosecution, the plaintiff has to satisfy the court on the following issues.

Did the defendants have a right to institute bankruptcy proceedings?

> The foundation of the action lies in abuse of the process of the court by wrongfully setting the law in motion and it is designed to discourage the perversion of the machinery of justice for an improper purpose.

said Sir John Beaumont in *Mohamed Amin v Jogendra Kumar Bannerjee & Ors* AIR 1947 SC 108 at p 112 (PC). This case also held that in order to succeed, the plaintiff must prove that the proceedings instituted against him were malicious, without reasonable and probable cause, and that they terminated in his favour and that he had suffered damage, and that the damage claimed is for damages to the person, to property or to reputation. Sir John went on to say at the same page as follows:

> ... That the word 'prosecution' in the title of the action is not used in the technical sense which it bears in criminal law is shown by the fact that the action lies for the malicious prosecution of certain classes of civil proceedings, for instance falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company ....

In *Bahori Lal & Anor v Sri Ram & Anor* AIR 1946 All 139, the court held that the mere presentation of the petition for insolvency tends to injure the credit and the reputation of the persons proceeded against in the society in which they move, much more so if they are actually adjudged insolvents and their property is seized by the receiver and the adjudication is annulled on appeal. The person so proceeded against is entitled to sue in tort for damages if the application for insolvency is malicious and without a reasonable and probable cause. It is immaterial whether he was a trader or not.

As a general rule, it is not an actionable wrong to institute civil proceedings without reasonable and probable cause, even though malice is provable. The recognized exceptions to this general rule are in the case of proceedings for bankruptcy, liquidation, arrest and execution against property instituted maliciously and without reasonable and probable cause. The principles applicable in all these excepted cases are the same as in actions for malicious prosecution for the institution of criminal proceedings (see *Premji Damodar v LV Govindji & Co* AIR 1947 Sind 169). Therefore, it is obvious that the principles applicable to civil malicious prosecution of bankruptcy proceedings are the same as in actions for malicious prosecution for the institution of criminal proceedings.

The facts of the case before me reveal that the judgment in default against the plaintiff was obtained without service of the summons on the plaintiff because, on a preliminary issue raised that the summons was never served on the plaintiff, the magistrate's court set aside the service of the summons and consequently the judgment in default was also set aside. Since the first defendant neither appealed against that decision nor elected to file a fresh action, as it was entitled to do since the case was only disposed

off, on a preliminary issue, there was no judgment to form the lynch pin for the bankruptcy proceedings. A

The bankruptcy proceedings

The entire bankruptcy proceedings were riddled with incurable irregularities: B

(i) the judgment upon which bankruptcy proceedings were instituted was a nullity;

(ii) the request for issue of the bankruptcy notice stated that the plaintiff resided at his office, which was purportedly his last known address. The contractual address for service or the last known address of the plaintiff was his home address, namely, 97 Jalan Lee Woon, Zoo View, Ulu Klang 68000 Selangor, and not the plaintiff's office which is in Kuala Lumpur; C

(iii) the bankruptcy notice which was extended for nine months from 28 February 1993, expired on 30 November 1993. This bankruptcy notice was never served, whether by personal service or by substituted service within this period, resulting in the demise of the bankruptcy notice and the order for substituted service. This fact was not revealed to the court; D

(iv) the defendants applied ex parte on 24 December 1993 to extend the life of the 'dead' bankruptcy notice and obtained the order dated 28 December 1993 purportedly for nine months. No order was made for the substituted service of the purported extended bankruptcy notice. Again these facts were not revealed to the court; E

(v) the defendants purportedly enforced a non-existent order for substituted service of a non-existent bankruptcy notice on the plaintiff on 28 February 1994. This fact too was not revealed to the court; F

(vi) the orders for extension of the bankruptcy notice dated 31 March 1993 and 28 December 1993 respectively, and the order for substituted service of the bankruptcy notice were obtained by misleading the court in that the affidavits filed in support of the applications contained misleading averments; G

(vii) the affidavit of non-service affirmed alleged that all reasonable efforts were made to serve the bankruptcy notice, whereas in fact no letter of appointment was sent to the plaintiff to enable the plaintiff to make himself available so that service could be effected; H

(viii) the affidavit in support of the application for substituted service of the bankruptcy notice affirmed alleged that the plaintiff was evading service of the bankruptcy notice when in fact his solicitors had written a letter dated 10 December 1992 to the second defendant;

(ix) the bankruptcy notice was never served on the plaintiff. In fact, the defendants never had a bankruptcy notice to serve the plaintiff; I

(x) there was no act of bankruptcy committed by the plaintiff;

(xi) the defendants, without a bankruptcy notice and without an act of bankruptcy issued out the creditor's petition in contravention of the Bankruptcy Act 1967;

(xii) the defendants misled the court into granting the order for substituted service of the creditor's petition, in that:

(a) the calls were not made at the plaintiff's address of service, namely, the plaintiff's residence;

(b) the letter of appointment purportedly sent to the plaintiff was not sent to his last known address, namely, the plaintiff's residence:

(c) the plaintiff did not receive the purported letter of appointment;

(d) the letter of appointment purportedly sent to the plaintiff came from the agent Sejana Services Sdn Bhd and not from the second defendant; and

(e) no enquiries were made by the process server with regard to the plaintiff.

In fact it is appropriate at this stage to remind creditors and their solicitors of the dire warning given by Mahadev Shankar J (as he then was) in *Rohani @ Hamidah bte Nor v Sincere Leasing Sdn Bhd* [1993] 1 AMR 225 when he said at p 231:

> ... Bankruptcy proceedings are penal in nature and judgment creditors and their solicitors will be well advised to take note of their responsibility more seriously.

Can the defendants claim they were acting on a valid judgment?

The defence of both the defendants and their evidence in court was that they were not without reasonable and probable cause to institute bankruptcy proceedings on the sole ground that they had a valid judgment at the material time of filing the said bankruptcy proceedings. The second defendant's additional defence was that it acted on the instructions of the first defendant.

In *Fitzjohn v MacKinder* 142 ER 199, Cockburn LJ in addressing this very same issue said at p 208 as follows:

> ... the defendant, in order to avoid the consequences of a proceeding on the face of it otherwise clearly wrongful and actionable, seeks to protect himself by shewing that he acted under the order of the county court judge. ... it is not competent to the defendant to shelter himself under this order, seeing that the judge was induced to make it through his perjury and fraud. To suffer the judge to make such an order without informing him of the truth, and disabusing his mind of the error into which he had been led by wilful falsehood, was, as it seems to me, a fraud upon the judge, as well as a wrongful act towards the plaintiff: and I cannot bring myself to think that the defendant should be allowed to shelter himself under an order having its origin in his own falsehood, and issuing through his own fraud.

I have enumerated all the various misgivings and mistakes committed by the defendants with respect to the obtaining of the judgment based on which the defendants commenced the bankruptcy proceedings. I cannot accept that under our law which ensures that no wrong can exist without a remedy, a litigant such as the plaintiff can be denied redress in the face of so blatant a wrong, on the ostensible ground that the defendants who had so flagrantly abused the process of the court by improperly obtaining a judgment could attempt to benefit from such iniquitous conduct on the sole basis that they were acting upon such an order of the court obtained improperly, which certainly no magistrate or judge would have granted, if appraised of the true circumstances. As for the second defendant whose additional ground was that they acted on instructions, surely it was their duty to have verified the validity of the order upon which they were asked to act.

Concealment of material facts

The default judgment, the bankruptcy notice, the extensions of the bankruptcy notice, the orders for substituted service of the bankruptcy notice and the creditor's petition, were obtained by the concealment of material facts. Had the courts known the true facts, the various orders obtained by the defendants would never have been granted. The default judgment was obtained by concealing from the court material evidence without which the court would not have granted default judgment.

(i) The judgment was obtained in default of appearance of the plaintiff on the return date and it was alleged that the plaintiff did not appear despite being served with the summons. The court was required to rely on the truthfulness of the affidavit of service and on the honesty of counsel appearing and seeking the order for default judgment.

(ii) The summons was however never served on the plaintiff and this fact was concealed from the court.

(iii) There was no evidence of service of the summons. This fact was not revealed to the court.

(iv) There was no endorsement of the service of the summons. This fact too was not revealed to the court. The affidavit of service on the contrary positively affirmed an endorsement when there was none.

(v) The evidence of the plaintiff in respect of the aforesaid matters was never challenged. The first defendant's then solicitors were not called to rebut this evidence. The defendants offered no explanation either.

In *Chee Pok Choy & Four Ors v Scotts Leasing Sdn Bhd* [2001] 4 MLJ 346, the Court of Appeal set out the law on the impeachment of a judgment obtained by concealment of material facts.

The Court of Appeal, in what it regarded as an exceptional case, examined the undisputed facts of the case beginning with the cause papers, including the affidavit filed by the respondent. The court found that nowhere in the affidavit was there any mention of the fact that the respondent was a moneylender. The respondent was held to have actively

A concealed that fact. The court further held that had the respondent not concealed the truth from the court when it obtained the foreclosure order, namely, that it was a licensed moneylender, its action would have been struck out. The respondent had therefore obtained the foreclosure order by fraud. The Court of Appeal took the view that the appellant's evidence was not subject to any serious challenge. In fact, much, if not all, of the evidence B relied upon in support of the allegation of fraud was made up of the respondent's own documents.

Failure of the defendants to comply with Practice Direction 1 of 1968

C To avoid repetition, I do not intend to reproduce the said lengthy practice note which has been reproduced in full in *Re Aris bin Massod; ex p UOL Factoring Sdn Bhd* [1999] 3 MLJ 358. This practice direction sets out the procedure for substituted service in respect of bankruptcy proceedings since neither the Bankruptcy Act nor the Bankruptcy Rules set out the procedure. Practice Direction 1/68 states that in such cases, an application must be D made to the High Court and it also sets out the number of calls to be made and that the said calls should be made at the defendant's residence, permanent or temporary, or if the claim relates to the defendant's business, at his business address. In the case before me, there was clearly non-compliance of this direction.

E On a default judgment that was not a final judgment

In *Re Udos ak Riging; ex p Seabanc Kredit Sdn Bhd* [1994] 3 MLJ 383, Abdul Kadir Sulaiman J (as he then was) held that under r 95 of the Bankruptcy Rules 1969 ('the Rules'), a bankruptcy notice is to issue only on a final judgment or order where executions had not been stayed and he went on to F hold that for the purpose of bankruptcy proceedings, a default judgment is not final because it had not been decided on its merits, and any judgment not given on merits is liable to be set aside on application and does not finally dispose of the rights of the parties. His Lordship went on to hold that if the debtor had not appealed within time, the default judgment would have crystallized into a final judgment. However, in that case, the debtor had G filed his application to set aside the default judgment within time and the court held that the judgment would only be final after he had exhausted his remedy given by law. The issue of a stay of execution would only be relevant if the default judgment was final. Therefore, pursuant to r 98 of the Rules, his Lordship held that no act of bankruptcy had been committed by the debtor under the notice. I agree with the views expressed by the learned H judge. In the case before me, the default judgment was never served on the plaintiff, thus giving him no opportunity to set it aside. It is my judgment therefore that the default judgment in this case had not crystallized into a final judgment and that bankruptcy proceedings ought not to have been commenced against the plaintiff.

I The first defendant relied heavily on the Supreme Court decision in *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100, to argue that a default judgment is a good and enforceable judgment until

set aside, and that therefore on that basis, the first defendant was entitled to proceed with the bankruptcy proceedings. The facts of the case in *Pembinaan KSY* are peculiar to the decision of the Supreme Court. The appellant company was the contractors to the respondent company for a development project of property owned by the respondent company. The balance of payment for work on the development project was due to the appellant company and they obtained a default judgment against the respondent company. In the meantime, a petition for winding up of the respondent company had been presented by the Morgan Guarantee Trust Co. The appellant company supported the petition as supporting creditor. The respondent company filed a notice to strike out the appellant company as a supporting creditor on the grounds that it had no locus standi to support the petition. The learned trial judge gave judgment for the respondent company as he held that the default judgment was null and void and should be set aside. The appellant company appealed. In allowing the appeal, the Supreme Court held that the default judgment, until set aside, was a good and enforceable judgment and that the appellant company was perfectly entitled to rely on the default judgment as a basis for its right to be a supporting creditor and should be recognized in the petition as a supporting creditor.

It is obvious therefore from the facts in *Pembinaan KSY* that there was no element of concealment of material facts, breach of a rule and malice, well within the knowledge of the defendants themselves to taint the default judgment. In the case before me, the defendants clearly and unambiguously conceded that the summons was not even served on the plaintiff. How then could they obtain a valid judgment against the plaintiff for this court to even consider the effect of the decision of the Supreme Court in *Adzmi bin Ali & Anor v Mohamed Isa bin Kasad* [1987] 2 MLJ 199. On the other hand, even if the defendants were to contend that upon the admission of the plaintiff that he owed the first defendant the sum claimed in the bankruptcy proceedings, the first defendant had failed to deny or reject the bill of the plaintiff to the first defendant which was a sum in excess of that claimed by the first defendant and in which case, if the first defendant had through the second defendant served its summons on the plaintiff, the plaintiff would have claimed a set off or would have counterclaimed? So, the mere existence of the debt from the plaintiff to the first defendant does not, by itself provide a defence to the plaintiff's claims.

Malice

In *SMT SR Venkataraman v Union of India & Anor* AIR 1979 SC 49, the Supreme Court of India relied on Viscount Haldane's description of malice as stated in *Shearer v Shields* [1914] AC 808 at p 813 which reads as follows:

> A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently.

The Supreme Court of India then proceeded to give its own views on malice at p 51:

> Thus, malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.

It is my judgment, that where it is plain that there is a want of a reasonable or probable cause or excuse, it is reasonable to conclude that the defendant could not honestly have believed in the charge he made and this in my view is evidence of malice. I further hold that evidence of malice can be construed from utter recklessness or failure to make proper and adequate enquiries, or not making any effort to test one's information or grounds of suspicion, for veracity. Applying these distilled principles, I can see malice scorching its way through this case. The first defendant was malicious in:

(a) proceeding with the summons and obtaining default judgment without replying to the plaintiff's letters and/or denying the plaintiff's claims;

(b) having requested the plaintiff for his bill for RM15,000 and having received the bill, proceeding to obtain default judgment;

(c) not making any request for payment on the default judgment before instituting and continuing with bankruptcy proceedings; and

(d) withholding execution proceedings for four and a half years before instituting bankruptcy proceedings.

The second defendant has specifically denied any malice in instituting the bankruptcy proceedings and the defence is that they had a reasonable and probable cause for instituting the same, without malice and in the bona fide belief that they were discharging their duty as solicitors for the first defendant. Basically, the second defendant's defence is similar to that of the first defendant in that there was a valid judgment subsisting at the time the bankruptcy proceedings were instituted. To avoid repetition, I hold that my judgment on this issue is as found against the first defendant. As for merely taking instructions, I am of the view that since the second defendant as solicitors was embarking on execution proceedings, it was its incumbent duty to have ascertained the validity of that very judgment that was to form the prop to support the bankruptcy proceedings. And in order to exercise that duty, the second defendant was clearly expected to check and verify if that judgment was indeed well founded, unimpeachable and was not even the subject of an appeal. The very fact that the judgment was an in default judgment should have put the second defendant to a high degree of alertness as to whether there was proper service of the summons. A search of the court file would have clearly shown the absence of an affidavit of service. To my mind, the lack of care on the part of the second defendant was sufficient to constitute malice. It is apropos that I cite a passage from *Johnson v Emerson & Sparrow* (1871) 25 LT 337, wherein Baron Martin said as follows at p 352:

> ... I quite agree that if an attorney, knowing a proceeding in bankruptcy to be groundless, presented a petition, either from the motive of gain to himself, or in obedience to the instruction of an oppressive and vindictive client, it would be in law a malicious act.

I was referred to another case, namely, *Vijendran a/l Ponniah v Bank of Commerce* [1998] 7 MLJ 418 wherein on the very same cause of action and on almost similar facts and brought by the very same plaintiff, my learned brother James Foong J in dismissing the action held:

> A judgment stands as a good judgment until set aside. When a judgment sum was not paid, then execution could enforced. This could take the form of a bankruptcy proceeding, as the case was. The court could not see any sinister reason for this approach taken by the defendants.

Whilst I agree with that view, the facts before me are totally different. Here the defendants knew that the judgment taken was improper and illegal because the summons had not even been served on the plaintiff. This very material fact distinguishes the two cases. Having considered the matter in its entirety, I find that the plaintiff had indeed proved his case for civil malicious prosecution against the defendants.

Abuse of process

To succeed in a claim for damages for the tort of collateral abuse of process, a claimant need not prove that the party claimed against had maliciously invoked the process of court, or that the proceedings had terminated in the claimant's favour. The claimant, however, would have to prove that the process complained of had been initiated by the party claimed against, and that the process was initiated for a purpose other than to obtain a genuine redress, and that the claimant had suffered some damage or injury in consequence thereof (see *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425). The essence of an abuse of process action is that the proceedings complained of were instituted and/or maintained for a purpose other than that for which they were properly designed or exist, or to achieve for the person instituting them some collateral advantage beyond that which the law offers, or to exert pressure to effect an object not within the scope of the process. The focus in such a suit is on the purpose for which the proceedings exist, and on the dominant purpose of the person charged with abuse of process in instituting them. It is my judgment that if the court is satisfied that the plaintiff has shown that there was want of reasonable and probable cause for instituting and/or for continuing with bankruptcy proceedings, the court must presume that the defendants instituted and continued with bankruptcy proceedings for a purpose other than that for which bankruptcy proceedings were properly designed or exist. It is not necessary for the plaintiff to show what that purpose was or to identify the collateral object. If the court is satisfied that in continuing with bankruptcy proceedings, the defendants acted unlawfully, negligently, unconscionably, with conscious wrongdoing in contumelious disregard for the plaintiff's rights, the plaintiff must succeed in his cause of action for abuse of process. If however the court is

not satisfied that there was want of reasonable and probable cause, the plaintiff must prove that the defendants instituted and/or continued with bankruptcy proceedings for one or all of the following purposes, namely:

(a) for a purpose other than that for which bankruptcy proceedings were properly designed or exist;

(b) to achieve for the defendants some collateral advantage beyond that which the law offers; or

(c) to exert pressure on the plaintiff to effect an object not within the scope of the process.

The fundamental purposes of bankruptcy proceedings are to recover a debt for which the plaintiff is lawfully entitled to and to distribute the assets of the defendant to the judgment creditors and the dominant purpose of the plaintiff must be to make the defendant a bankrupt. In my view, a purpose is not improper unless it involves a demand made without right, or unless it entails a consequence unrelated to or not proportionate with the right, interest or wrong asserted in the proceedings or by the process said to have been abused (see *Williams v Spautz* (1992) 174 CLR 509). Considering the facts of the case apropos to the law as stated, the defendants commenced bankruptcy proceedings for a sum not exceeding half of the amount that was owed by the first defendant to the plaintiff. In my view, there was no proper commercial purpose to be served by seeking the plaintiff's bankruptcy and the distribution of his assets. Consequently, the bankruptcy proceedings were an abuse of process commenced and maintained to effect an object not within the scope of the process and causing the plaintiff damages. When process is abused, the unfairness against which a litigant is entitled to protection, is his subjection to process, which is not intended to serve, or which is not capable of serving its true purpose. In continuing with bankruptcy proceedings, the defendants acted unlawfully, negligently, unconscionably with conscious wrongdoing in contumelious disregard for the plaintiff's rights.

DAMAGES

For civil malicious prosecution

General

The plaintiff is an advocate and solicitor of 25 years' standing. The damages to the plaintiff's reputation with regard to his professional status is that:

(a) the plaintiff did not pay what was owing on a credit card;

(b) the plaintiff could not even pay such a small sum of RM7,519.44;

(c) a bankruptcy notice was issued against him;

(d) he evaded service of the bankruptcy notice;

(e) he committed an act of bankruptcy;

(f) he is unable to pay his debts;

(g) a creditor's petition was taken out against him;

(h) he evaded service of the creditor's petition;

(i) the creditor's petition against him was required to be published in a national newspaper;

(j) the plaintiff may be removed from the roll of advocates and solicitors;

(k) prospective clients including banks and financial institutions would never engage him;

(l) he cannot be trusted with any money;

(m) his practice as an advocate and solicitor is in jeopardy;

(n) the plaintiff's name appears in the data bank of a credit check company, namely, CTOS Sdn Bhd, and that a creditor's petition has been taken out against him;

(o) the plaintiff's name, as such, would also appear in the data banks of other credit check companies;

(p) he can never obtain a loan or similar facility from any bank or financial institution.

The damage to the plaintiff's reputation with regard to his social status is that:

(i) the stigma of having a creditor's petition taken out against him will forever remain;

(ii) there will always be the likelihood that he will suffer the same humiliation as happened when Maybank refused to open an account for him;

(iii) he will never be nominated or elected to any official position in any club or social body;

(iv) his colleagues in the legal profession will shun him;

(v) his wife and members of his family will forever suffer the same humiliation.

Having considered all these factors, I award a sum of RM200,000 as general damages against both the defendants.

Aggravated

Every action and step taken by the defendants from the very beginning was dishonest, malicious and totally reckless. The aggravated damage to the plaintiff arises out of:

(a) the refusal of the defendants to reply to his letters and telephone calls for several years;

(b) the defendants proceeding with every step including obtaining default judgment, instituting bankruptcy proceedings and continuing with bankruptcy proceedings in stealth;

(c) the use of bankruptcy proceedings against the plaintiff especially so knowing that he is a practising advocate and solicitor;

(d) prosecuting the plaintiff in the several applications made in the bankruptcy court and in the bankruptcy proceedings;

A (e) continuing to adamantly maintain and justify the obviously untenable defences; and

(f) not apologizing for their conduct.

Under this head, I award the plaintiff the sum of RM100,000 against both the defendants. I do not think that this is a fit and proper case to consider
B awarding exemplary damages as has been urged upon me.

For abuse of process

Under this head, I award a sum of RM100,000 against both the defendants.

All the awards will bear interest at 4%pa from the date of the issuance
C of the bankruptcy notice to the date of judgment and costs.

Order accordingly.

Reported by Ashley Tan

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